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No. 584

In the Supreme Court of the United States

OCTOBER TERM, 1942

HONORABLE MICHAEL J. ROCHE, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, AND THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, PETITIONERS

v.

EVAPORATED MILK ASSOCIATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General on behalf of petitioners prays that a writ of certiorari be issued to review a judgment of the Circuit Court of Appeals for the Ninth Circuit granting a writ of mandamus to require the United States District Court for the Northern District of California, Southern Division, and the judge of that court to reinstate certain pleas in abatement to the indictment in the case of *United States* v. *Evaporated Milk Association, et al.*, which pleas the district court had stricken as insufficient in law.

OPINION BELOW

The opinions of the Circuit Court of Appeals (R. 130–147) are reported in 130 F. (2d) 843.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 12, 1942 (R. 148, 129). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below was authorized to issue a writ of mandamus to the district court to correct its alleged error in ruling upon the sufficiency of respondents' pleas in abatement.[1]

STATUTE INVOLVED

Section 262 of the Judicial Code, 28 U. S. C., Sec. 377, provides in part:

> The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

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[1] If certiorari is granted, the Government reserves the right to argue that, even if this case is one in which writ of mandamus might properly issue, the district court did not err in its holding that respondents' pleas in abatement were insufficient. On this point see the opinions of the dissenting judges (R. 135–147).

STATEMENT

An indictment returned in June 1941 in the United States District Court for the Northern District of California, Southern Division, in a case entitled *United States* v. *Evaporated Milk Association, et al.*, charged respondents and certain other defendants with conspiring to fix the prices of evaporated milk sold in certain States and territories, in violation of Sections 1 and 3 of the Sherman Act (R. 12–21). The indictment stated that the grand jury which returned the indictment had been impaneled at the November 1940 Term of court and that, by order of the court, it had continued to sit during the March 1941 Term for the sole purpose of finishing investigations begun but not completed during the November Term (R. 12–13).

In September 1941 respondents filed pleas in abatement which alleged certain facts designed to show that investigation of the subject matter of the indictment had not been begun by the grand jury during the November 1940 Term of court (R. 34–48).[2] The Government filed replications which were in the nature of general denials but

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[2] The pleas were based upon Section 284 of the Judicial Code, 28 U. S. C., Sec. 421, which provides in part:

"* * * A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, * * *."

later, with leave of court, withdrew its replications and filed motions to strike the pleas in abatement (R. 52–55). The grounds for these motions were that the pleas in abatement did not state specific facts with sufficient certainty, that the facts alleged could not be within the pleaders' own knowledge, and that the pleas were insufficient in law (R. 53–54). The court, after hearing, granted the motions to strike the pleas (R. 69–70).

Respondents thereupon instituted in the court below the present mandamus proceedings against petitioners, the judge of the district court and the district court, praying that they be required to reinstate the pleas in abatement and the replications thereto and to set the issues raised by the pleas for jury trial (R. 1–12). The court heard the case on the petition for writ of mandamus and petitioners' return to the show cause order (R. 56–64). On March 4, 1942, the court, without opinion, issued an order granting the relief prayed by respondents (R. 124–125).

The court subsequently granted a rehearing, and specifically ordered that it be heard before the seven circuit judges sitting *en banc* (R. 128). In an opinion rendered September 12, 1942, the court held that it had jurisdiction to issue mandamus, that the district court had erred in striking the pleas in abatement, that the facts justified intervention by mandamus, and that a writ of mandamus should issue to require petitioners to reinstate

the pleas in abatement and the replications thereto and to try the factual issues thus raised (R. 130–134).[3] An order directing that the writ of mandamus issue in accordance with the court's opinion has been stayed pending the filing of a petition for writ of certiorari and final action thereon by this Court (R. 150).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that mandamus will lie to reverse the action of the district court in striking pleas in abatement for insufficiency.

(2) In holding that the order of the district court striking pleas in abatement for insufficiency constituted a refusal to act upon the pleas.

(3) In holding that the district court erred in striking the pleas in abatement.

(4) In ordering that a writ of mandamus issue.

REASONS FOR GRANTING THE WRIT

1. The effect of the decision below is to permit use of the writ of mandamus to obtain interlocutory review of decisions on pleas in abatement, notwithstanding the fact that a defendant may not take a direct appeal.[4] Such a result would

[3] Judge Stephens did not participate in the decision (R. 134) and Judges Denman and Healy filed separate dissenting opinions (R. 135–147).

[4] An additional question to be considered is whether a ruling on a plea of abatement, other than one to the jurisdiction of the court, may afford grounds for reversal on appeal at any time, in view of the language of 28 U. S. C., Sec. 879 (R. S.

frustrate the policy which Congress has long established that there shall be no appeal from interlocutory rulings which do not dispose of the entire controversy. To permit "piecemeal disposition on appeal of what for practical purposes is a single controversy" would enfeeble "judicial administration." *Cobbledick* v. *United States*, 309 U. S. 323, 325. In particular, the momentum of criminal justice "would be arrested by permitting separate reviews of the component elements in a unified cause" (*ibid.*).

The decision below is in conflict, not only with this general principle, but with its special application to writs of mandamus. In *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry. Co.*, 148 U. S. 372, 379, this Court said in this connection:

> Least of all, can a writ of mandamus be granted to review a ruling or interlocutory order made in the progress of a cause: for, as observed by Chief Justice Marshall, to do this "would be a plain evasion of the provision of the act of Congress that final judgments only should be brought before this court for reexamination;" would "introduce the supervising power of this court into a cause while depending in an inferior court, and prematurely to decide it;" would allow an appeal or writ of error upon the

Sec. 1011, 1 Stat. 84). If that Act means what it says, the policy of Congress that errors on such matters shall not be grounds for reversal is demonstrated beyond question.

same question to be "repeated, to the great oppression of the parties;" and "would subvert our whole system of jurisprudence." *Bank of Columbia* v. *Sweeny*, 1 Pet. 567, 569; *Life & Fire Ins. Co.* v. *Adams*, 9 Pet. 573, 602.

2. This Court has consistently and repeatedly held that the writ of mandamus cannot be used to perform the office of an appeal or writ of error to review the judicial action of an inferior court, and that the sole function of the writ, in cases where the inferior court had jurisdiction, is to require the court to act where it has refused to do so. *Ex parte Davenport*, 6 Pet. 661; *Ex parte Newman*, 14 Wall. 152, 165–166, 169; *Virginia* v. *Rives*, 100 U. S. 313, 323; *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry. Co.*, 148 U. S. 372, 379; *In re Pollitz*, 206 U. S. 323, 331; *Interstate Commerce Commission* v. *United States*, 289 U. S. 385, 393–394.

In this case, the court below sought to justify its ruling on the ground that the district court's order striking the pleas in abatement was a refusal "to proceed to trial" (R. 131). But the order sustaining the motion to strike, like an order sustaining a demurrer, was not a refusal to try, but a final adjudication, after argument, that the pleading was insufficient in law. Such a judgment, based on the pleadings, is entitled to as much weight as an exercise of judicial discretion based upon evidence. The mandamus proceed-

ing was therefore brought, not to compel action where there had been a refusal to act, but to correct alleged error committed in the adjudication of a legal question.

The decision below, which seems to recognize that the matter was one upon which the trial court "exercised its judgment" (R. 131), thus is in conflict with the many authorities sustaining the principle referred to above, which hold that the writ cannot be used in place of an appeal as a means of correcting an error in judgment. The writ "does not apply at all to a judicial act to correct an error, as where the act has been erroneously performed." *Ex parte Newman*, 14 Wall. 152, 169. A mandate may direct a judge "to exercise his judicial discretion or judgment, [but] without any direction as to the manner in which it shall be done" (*ibid.*). After a court or an administrative body has exercised its judgment, the result of an issuance of the writ would not be to compel the court "to adjudicate the cause, for that it has already done; the result would be to compel an adjudication in a particular way. The rule is elementary that this is not the function of the writ. Mandamus is an appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal or writ of error to dictate the manner of his action." *Interstate Commerce Commission* v. *United States*, 289 U. S. 385, 394.

3. Under Section 262 of the Judicial Code a circuit court of appeals has jurisdiction to issue extraordinary writs only when they are auxiliary to appeals or in aid of appeals and not when it is sought to use them in lieu of the ordinary appellate processes. See Brief for the Government in *Adams et al.* v. *United States ex rel. McCann,* No. 79, this Term, Point I–A, pages 17–33. In the instant case, even more clearly than in the *McCann* case,[5] the application for the writ was made not to aid appellate jurisdiction otherwise existing, but as a substitute for an appeal.

4. Inasmuch as the decision below opens a new avenue for the review of interlocutory decisions, its effect on the administration of criminal justice would be serious. The issue presented is thus one of public importance.[6]

CONCLUSION

The decision below is in conflict with applicable decisions of this Court and establishes a precedent

[5] In the instant case no appeal had been taken, nor would one lie, from the interlocutory order.

[6] In criminal cases such pleas are usually grounded on alleged irregularities in the grand jury proceedings. Because of the secrecy attaching to grand jury proceedings, defendants are seldom able to make the requisite specific allegations of error and, as dissenting Judge Healy declared, "their pleas in abatement contemplate nothing more nor less than a fishing expedition into the proceedings had before the grand jury relative to their case" (R. 147). Unless the district courts strictly construed such pleas, the accused would, in advance of trial, frequently "obtain access to wholly privileged material" (*ibid*).

which, if generally followed, would seriously obstruct the administration of criminal justice in the federal courts. It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

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